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No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,

Petitioners.

v.

KIRK COLE, COMMISSIONER, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, *et al.*,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR NATIONAL ABORTION FEDERATION AND ABORTION PROVIDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICI CURIAE* NATIONAL ABORTION FEDERATION 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. H.B.2 HAS DRAMATICALLY REDUCED THE AVAILABILITY OF ABORTION CARE IN TEXAS 8

II. TEXAS'S REMAINING PROVIDERS CANNOT REPLACE THE SERVICES THAT WERE LOST AS A RESULT OF H.B.2 16

III. H.B.2 IMPOSES AN UNDUE BURDEN ON TEXAS WOMEN 20

CONCLUSION 37

TABLE OF AUTHORITIES

Cases — Page(s)

Ezell v. City of Chicago,
651 F.3d 684 (7th Cir. 2011) 25

Jackson Women's Health Org. v. Currier,
760 F.3d 448 (5th Cir. 2014).....14, 25

June Medical Services, LLC d/b/a/ Hope Medical Group for Women v. Caldwell,
No. 3:14-cv-00525 (M.D. La. Aug. 31, 2014) 24

Planned Parenthood Ariz., Inc. v. Humble,
753 F.3d 905 (9th Cir. 2014),
cert. denied 135 S. Ct. 870 (2014) 30

Planned Parenthood Se. Inc., v. Strange,
33 F. Supp. 3d 1330 (M.D. Ala. 2014).....13, 30

Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833 (1992).....*passim*

Planned Parenthood of Wis., Inc. v. Schimel,
806 F.3d 908 (7th Cir. 2015) .....*passim*

Planned Parenthood of Wis., Inc. v. Van Hollen,
738 F.3d 786 (7th Cir. 2013),
cert. denied, 134 S. Ct. 2841 (2014) 14, 30

Whole Woman's Health v. Cole,
790 F.3d 563 (5th Cir. 2015).....19

Whole Woman's Health v. Lakey,
46 F. Supp. 3d 673 (W.D. Tex. 2014).....*passim*

Constitutional Provisions, Statutes and Rules

U.S. Const. amend. XIV 37

Tex. Health & Safety Code Ann. §171.012 (West 2014) 31

Tex. Health & Safety Code Ann. §171.044 (West 2014) 6

Tex. Health & Safety Code Ann. §171.063 (West 2014) 31

Texas House Bill 2 (codified at Tex. Health & Safety Code Ann. §§171.0031, 171.041 to .048, 171.061 to .064, 245.010 to .011 .....*passim*

Supreme Court Rule 37.6 1

Other Authorities

Brief of *Amici Curiae* Women Injured by Abortion and an Abortion Survivor, *Whole Woman's Health v. Lakey*, No. 14-50928 (5th Cir. Nov. 10, 2014) 8

Brief for Petitioners, *Whole Woman's Health, et al. v. Cole*, No. 15-274 (filed Dec. 28, 2015) 10

Department of State Health Services, *Maternal Mortality and Morbidity Task Force Report* (Sept. 2014) 9

Exceptionally Deadly, The Economist (July 18, 2015).....9

Manny Fernandez, *Abortion Law Pushes Texas Clinics to Close Doors*, N.Y. Times (Mar. 6, 2014) 12

Fewer Abortion Clinics in Texas, N.Y. Times (June 10, 2015) 29

Daniel Grossman, et al., *Change in Abortion Services After Implementation of a Restrictive Law in Texas*, 90(5) Contraception 496 (2014) 6, 17, 33

Daniel Grossman et al., *The Public Health Threat of Anti-Abortion Legislation*, 89(2) Contraception 73 (2014) 35

Kinsey Hasstedt, *The State of Sexual and Reproductive Health and Rights in the State of Texas: A Cautionary Tale*, 17 Guttmacher Policy Review 14 (2014) 9

Erica Hellerstein, *The Rise of the DIY Abortion in Texas*, The Atlantic (June 27, 2014) 8, 35

Olga Khazan, *The Difficulty of Getting an Abortion in Texas*, The Atlantic (Jan. 14, 2014) 8

Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 Guttmacher Policy Review 70 (2015) 36

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Kim Soffen, *How Texas Could Set National Template for Limiting Abortion Access*, N.Y. Times (Aug. 19, 2015) 21

TEXAS HEALTH AND HUMAN SERVICES COMMISSION, FACTORS INFLUENCING HEALTH CARE ON THE TEXAS-MEXICO BORDER (2014) 23

Texas Policy Evaluation Project, *Abortion Wait Times in Texas: The Shrinking Capacity of Facilities and the Potential Impact of Closing Non-ASC Clinics* (Oct. 5, 2015) 6, 18, 19, 31, 32, 33

Texas Policy Evaluation Project, *Access to Abortion Care in the Wake of HB2* (July 1, 2014) 21

Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, Am. J. Pub. Health (Sept. 2014) 34

STATEMENT OF INTEREST OF *AMICI CURIAE* NATIONAL ABORTION FEDERATION[1]

The National Abortion Federation ("NAF") in conjunction with NAF members listed below, submit this *amici curiae* brief in support of the appeal of *Whole Woman's Health v. Cole*, filed by Petitioners Whole Woman's Health, Austin Women's Health Center, Killeen Women's Health Center, Nova Health Systems D/B/A Reproductive Services, Sherwood C. Lynn, Jr., M.D., Pamela J. Richter, D.O., and Lendol L. Davis, M.D. on December 28, 2015.

NAF is the professional association of abortion providers. Its mission is to ensure safe, legal, and accessible abortion care, which promotes health and justice for women. NAF's members include nearly 400 private and non-profit clinics, Planned Parenthood affiliates, women's health centers, physicians' offices, and hospitals. Together they care for half the women who choose abortion in the U.S. and Canada each year, including Texas women. NAF is the leading organization offering accredited continuing medical education to health care professionals in all aspects of abortion care. Its member providers adhere to NAF's evidence-based

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[1] The parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, *Amici Curiae* state that no counsel for a party has authored this brief, in whole or in part, and no person, other than *Amici Curiae* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Clinical Policy Guidelines, which set the standards for quality abortion care.

Through its supporting organization, NAF Hotline Fund, NAF also operates a toll-free Hotline, which was established in 1979 to help women access unbiased information and referrals to NAF member providers offering safe, high-quality abortion care. The Hotline receives thousands of calls each week from women, their partners, families, and friends. The Hotline offers factual information about pregnancy and abortion; confidential, non-judgmental support; referrals to quality abortion providers in the caller's area; limited financial assistance; help understanding state abortion restrictions; and case management for women with special or unique needs.

NAF and its members thus have a direct and deep-seated interest in this litigation, and in the well-settled constitutional right this Court reaffirmed in *Planned Parenthood v. Casey*. NAF respectfully asks this Court to consider this brief in support of Petitioners' brief and oral argument. The following NAF members, not parties to this litigation but providing abortion care in Texas or in neighboring states, also join this brief as *amici*:

- Alamo Women's Reproductive Services (San Antonio, Texas)
- Houston Women's Clinic (Houston, Texas)
- Southwestern Women's Surgery Center

(Dallas, Texas)

- Women's Center of Houston
(Houston, Texas)

- Routh Street Women's Clinic
(Dallas, Texas, *closed June 13, 2015, as a result of H.B.2*)

- Southwestern Women's Options
(Albuquerque, New Mexico)

- Hope Medical Group for Women
(Shreveport, Louisiana)

SUMMARY OF ARGUMENT

Texas House Bill 2 ("H.B.2")[2] is an unprecedented infringement upon Texas women's right to choose abortion care without undue state interference. H.B.2 also constitutes a direct assault on the principles this Court held to be the law of the land in *Casey*. The Texas legislators and elected officials who sponsored and supported H.B.2 bluntly acknowledged that their overarching intent was to end or sharply curtail access to abortion care in Texas, and it is undeniable that the corresponding impact on Texas women has been to severely restrict their access. As the District Court found, H.B.2 immediately halved the number of Texas abortion providers. *See Whole Woman's Health v. Lakey*, 46

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[2] 83rd Leg., 2nd Spec. Sess. (Tex. 2013), codified at Tex. Health & Safety Code Ann. §§171.0031, 171.041 to .048, 171.061 to .064, 245.010 to .011.

F Supp. 3d 673, 681 (W.D. Tex. 2014). But for this Court's intervention and interim stay, H.B.2 would have eliminated more than 75% of Texas abortion providers.

If the Fifth Circuit's mandate is permitted to take effect, the anticipated result will be devastating. Ten or fewer providers will remain in Texas, as compared with the more than 40 providers that were in existence immediately prior to H.B.2's enactment. Moreover, apart from a McAllen abortion care provider that would be subject to highly restrictive conditions imposed by the Fifth Circuit, those providers that remain will be confined to four metropolitan areas—hundreds of miles away from many low-income and underserved communities that most need timely, quality, and affordable care.

Based on H.B.2's impact thus far, the handful of remaining providers will not be able to compensate for the forced shutdown of the majority of Texas's abortion providers. Rather, the remaining providers will be overburdened, delaying access to abortion care, and creating unnecessary hurdles for women who choose to exercise the fundamental right this Court reaffirmed in *Casey*. Indeed, wait times already have quadrupled at some providers, pushing many Texas women as much as three weeks further into their pregnancies before they can access care. This delay, as well as the other more severe obstacles imposed on hundreds of thousands of Texas women who have no access to nearby providers, will only be exacerbated if H.B.2 is allowed to go into effect as the Fifth Circuit intended and roughly half of the providers that currently remain open are

permanently shuttered.

Moreover, the factual record in this case confirms that new facilities are unlikely to replace the ones closed by H.B.2, given that the statute imposes onerous, cost-prohibitive, and medically unnecessary building and staffing requirements. Restricting access to abortion care was the intent of this law, and it is thus unsurprising that H.B.2 has had its desired result.

H.B.2 imposes a substantial burden on Texas women. As the factual record below confirms, many Texas women—including women from low-income and immigrant communities—are already required to travel hundreds of miles, or leave Texas entirely, to access clinical care. The hardships and costs associated with significant travel are substantial for many women. When considered in light of other Texas laws requiring mandatory waiting periods and repeat visits for certain procedures, those burdens are even more onerous. The result is a substantial obstacle and undue burden on a woman's right to choose abortion care.

The burdens imposed by H.B.2 also create significant, unnecessary health risks for many women who already have inadequate access to basic health care. The limited availability of appointments and lengthy distances required to travel to a provider mean that many women are pushed later into their pregnancies before they can access the abortion care they need. The resulting delay is significant, and widespread provider closures and dramatically longer wait times have already caused the proportion of

second trimester abortion procedures to increase. *See* Daniel Grossman, et al., *Change in Abortion Services After Implementation of a Restrictive Law in Texas*, 90(5) Contraception 496-501 (2014) [hereinafter "*Change in Abortion Services*"]; Texas Policy Evaluation Project, *Abortion Wait Times in Texas: The Shrinking Capacity of Facilities and the Potential Impact of Closing Non-ASC Clinics* (Oct. 5, 2015), *available at* http://www.ibisreproductivehealth.org/sites/default/files/files/publications/Abortion%20Wait%20Time%20Brief%20Oct%205.pdf (last visited Jan. 3, 2016) [hereinafter "*Wait Times in Texas*"]. If H.B.2 is allowed to stand and the number of providers is roughly halved again, it is plain that this trend will only continue.

These delays have a direct and detrimental impact on Texas women's health and abortion care options. Although abortion care is one of the safest medical procedures, the risk of complications—as with pregnancy generally—increases as pregnancy progresses. Additionally, delays past Texas's 20-week limit prevent women from obtaining abortion care altogether, with limited exceptions. *See* Tex. Health & Safety Code Ann. §171.044 (West 2014). The practical burdens imposed by H.B.2 invariably will lead women to resort to less safe alternatives, such as self-medicating. Evidence exists that Texas women already have taken this route due to extensive abortion restrictions and the lack of accessible providers. Further decreasing access will only exacerbate this problem.

For many Texas women, H.B.2 thus creates an impermissible obstacle to accessing abortion care.

This law imposes an unconstitutional burden on Texas women, and must be struck down.

ARGUMENT

In *Casey*, this Court instructed states that they may not enact laws "designed to strike at the right [to abortion] itself." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992). Consequently, this Court held that states may not impose an "undue burden" on that right by enacting laws having "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. Anticipating restrictions like the Texas law at issue here, the Court cautioned:

> As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. *Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.*

Id. at 878 (emphasis added).

Both the purpose and effect of H.B.2 is to present a "substantial obstacle" to Texas women seeking abortion care. *Id.* at 877. Legislators and elected officials at the highest levels of Texas government have stated unequivocally that the *real* purpose of H.B.2 was to make "abortion, at any stage, a thing of the past" by essentially banning abortion

statewide—a reality that was candidly embraced by the law's supporters in their Fifth Circuit Court of Appeals briefing.[3] As the District Court found, H.B.2's purported health benefits are nonexistent, and have "such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary." *Lakey*, 46 F. Supp. 3d at 684. H.B.2 puts abortion care effectively out of reach for a significant number of Texas women and should be struck down.

I. H.B.2 HAS DRAMATICALLY REDUCED THE AVAILABILITY OF ABORTION CARE IN TEXAS

Texas is the second largest state in the U.S., both by population and geographic area, and home to approximately 5.4 million women of reproductive age. Texas also has the highest proportion of citizens without medical insurance of any state in the nation, and consistently rates near the bottom of national

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[3] *See* Brief of *Amici Curiae* Women Injured by Abortion and an Abortion Survivor at 2, *Whole Woman's Health v. Lakey*, No. 14-50928 (5th Cir. Nov. 10, 2014) (suggesting H.B.2 is good law because women are "far better protected by no access than access" to abortion care). Then-Governor Rick Perry, who signed the bill into law and made it part of his broader initiative to "make abortion, at any stage, a thing of the past," stated bluntly with respect to H.B.2 that "[t]he ideal world is one without abortion. Until then, we will continue to pass laws to ensure that they are rare as possible." Olga Khazan, *The Difficulty of Getting an Abortion in Texas*, The Atlantic, January 14, 2014; Erica Hellerstein, *The Rise of the DIY Abortion in Texas*, The Atlantic, June 27, 2014 [hereinafter "*Rise of the DIY Abortion*"]. *See also Lakey*, 46 F. Supp. 3d at 685; ROA 2625.

health care access rankings. Kinsey Hasstedt, *The State of Sexual and Reproductive Health and Rights in the State of Texas: A Cautionary Tale*, 17 Guttmacher Policy Review 14, 14 (2014). The state's abysmal health care record has led to poor outcomes for pregnant women and staggering racial disparities in care. For example, the State Task Force on Maternal Mortality and Morbidity reported last year that while there were 24.4 pregnancy-related deaths per 100,000 overall births in Texas in 2011, among African-American women there were 67.3 such deaths per 100,000 live births.[4] The Task Force concluded that pregnancy-related deaths are on the rise, and that between 20% and 50% are preventable. *See* Department of State Health Services, *Maternal Mortality and Morbidity Task Force Report* at 6 (Sept. 2014), *available at* https://www.dshs.state.tx.us/legislative/2014/Attachment1-MMMTF-Leg Report-FCHS-1-081214.pdf (last visited Jan. 3, 2016).

Prior to H.B.2's passage, there were more than 40 abortion providers in Texas. These providers were located in 16 cities, ranging from El Paso in the west to Beaumont in the east, and from McAllen and Harlingen in the south to Dallas/Fort Worth and Lubbock in the north and north-central, respectively. As a result of H.B.2, which is only partially in effect, this broad geographic coverage ceased and the

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[4] The rate of maternal mortality in Texas exceeds the national average of 18.5 deaths per 100,000 births. *See Exceptionally Deadly*, The Economist, July 18, 2015, http://www.economist.com/news/united-states/21657819-death-childbirth-unusually-common-america-exceptionally-deadly.

number of providers plummeted. It currently stands at 19. *See* Brief for Petitioners at 6, 11, 23-24, *Whole Woman's Health, et al. v. Cole*, No. 15-274 (filed Dec. 28, 2015) [hereinafter "Petitioners' Brief"].

If the Fifth Circuit's decision is allowed to stand, only ten or fewer providers are likely to remain in Texas, all but one of which will be clustered in Texas's four principal metropolitan areas of Dallas/Fort Worth, Austin, San Antonio, and Houston.[5] This 75% reduction will leave the vast majority of Texas communities without *any* access to abortion care. Indeed, it was undisputed before the District Court that the entire western half of the state—covering over 130,000 square miles—would be utterly devoid of any abortion care providers whatsoever. *See Lakey*, 46 F. Supp. 3d at 680-81.

Of course, this outcome is precisely what Texas legislators expected and intended in passing H.B.2. *See supra* note 3. As the District Court found based on the factual record presented by the petitioner below, H.B.2 has "such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary," *Lakey*, 46 F. Supp. 3d at 684. Like the similar—though less restrictive—Wisconsin law that the Seventh Circuit recently struck down under this Court's *Casey* decision, H.B.2 "is difficult to explain save as a method of preventing abortions that

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[5] The lone facility located outside these cities is Whole Woman's Health's clinic in McAllen, Texas. Yet, under the Fifth Circuit's ruling, that clinic may only serve women from the immediately contiguous counties, who will be served by only one post-retirement age, part-time doctor. *See* Petitioners' Brief at 24-25.

women have a constitutional right to obtain." *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 912 (7th Cir. 2015) (Posner, J.). H.B.2's sponsors *knew* its effect would be to shutter the majority of Texas abortion care providers, and that is precisely what occurred following its passage, when half of the providers in Texas were forced to close. If H.B.2 is allowed to stand, the number of providers will be roughly halved again.

The reality here is that, by design, most facilities will not be able to comply with H.B.2's ambulatory surgical center ("ASC") requirements. Many of these requirements impose arbitrary rules for construction-related conditions such as square footage requirements, ceiling finishes, number and placement of janitorial closets and parking spaces, which have no impact on, or connection to, the quality of abortion care. As the District Court found, the evidentiary record confirms that the expense of updating facilities to comply with H.B.2's laundry list of technical requirements is extraordinary and prohibitive. *See Lakey*, 46 F. Supp. 3d at 682 (costs of retrofitting existing facilities "undisputedly approach 1 million dollars and will most likely exceed 1.5 million dollars"). Likewise, it cannot be assumed that future clinics will be built to replace the ones that have closed. As the District Court correctly recognized, building a new clinic that could meet H.B.2's lengthy requirements would entail significant expense and the acquisition of substantially greater amounts of property. *See id.* ("[A] new compliant clinic will likely exceed three million dollars.").

In addition to these physical and construction

requirements, H.B.2 requires physicians to hold admitting privileges at a hospital located within 30 miles of the clinic. Texas physicians' recent experiences underscore that it is difficult, and frequently impossible, for even well-qualified doctors to obtain such privileges when they are associated with an abortion care provider. Manny Fernandez, *Abortion Law Pushes Texas Clinics to Close Doors*, N.Y. Times (Mar. 6, 2014), http://www.nytimes.com/2014/03/07/us/citing-new-texas-rules-abortion-provider-is-shutting-last-clinics-in-2-regions.html?_r=0 ("[N]early all of [Whole Woman's Health's] doctors were unable to obtain admitting privileges at nearby hospitals . . . some hospitals declined to even provide doctors with applications for admitting privileges").

As the trial record established, and as many NAF members have found first-hand, qualified physicians are routinely denied admitting privileges without any justification, requiring the closing of multiple providers even in major metropolitan areas. *See Lakey*, 46 F. Supp. 3d at 685 (noting that "doctors in Texas have been denied privileges for reasons not related to clinical competency"). The requirement has been an insurmountable barrier even for those providers that have been able to comply with H.B.2's other requirements.

Many Texas hospitals require that their physicians handle a fixed number of hospital admissions annually. Due to the fact that abortion care is very safe, few patients ever experience complications requiring hospitalization, and abortion providers whose sole practice is abortion care

consequently admit very few patients to the hospital. *Cf. Schimel*, 806 F.3d at 917 (noting that "[b]ecause of the very low rate of complications from abortions that require hospitalization, the required quotas may be difficult to meet"); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1344 (M.D. Ala. 2014) (doctors who obtained admitting privileges could lose them if they did not treat a sufficient number of patients in the hospital that issued the privileges).

NAF members have experienced these difficulties first-hand. For example, NAF member Routh Street Women's Clinic ("Routh Street") in Dallas, which was forced to close its doors in June 2015 due to H.B.2, has described the admitting privileges requirement as "devastating" and cited it as the main factor causing its closure. Routh Street had two physicians on staff prior to H.B.2, but only one—Routh Street's medical director—had admitting privileges, which he was able to retain because he maintained a separate, full-time OB/GYN practice, which allowed him to generate the 48 annual hospital admissions needed to maintain active privileges. When H.B.2's admitting privileges requirement went into effect and the other physician could not obtain privileges, it effectively cut the clinic's capacity in half. Furthermore, even though Routh Street's medical director was able to retain admitting privileges, it was necessary to maintain his OB/GYN practice to continue to generate the minimum number of required hospital admissions. Not surprisingly, operating two full-time medical practices without the support of an additional physician proved unsustainable, and Routh Street closed after providing high-quality abortion care to Texas women

for 36 years.

The experience of Texas abortion providers has been consistent with that of abortion providers in other states with new admitting privileges requirements. Across the country, abortion providers routinely are denied admitting privileges for reasons wholly unrelated to their medical skills or qualifications. *See, e.g.*, *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 451 n.3 (5th Cir. 2014) (hospitals' justification for denying admitting privileges to abortion providers included: "'[t]he nature of your proposed medical practice is inconsistent with this Hospital's policies and practices as concerns abortion and, in particular, elective abortion'; and '[t]he nature of your proposed medical practice would lead to both an internal and external disruption of the Hospital's function and business within this community'"); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 792 (7th Cir. 2013) (recognizing "resistance" that doctors could face when seeking admitting privileges, "given the widespread hostility to abortion and the lack of any likely benefit to a hospital from granting such privileges to an abortion doctor"), *cert. denied*, 134 S. Ct. 2841 (2014).[6]

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[6] In addition to these medically unnecessary procedural obstacles, fear of harassment and violence may further reduce the available pool of doctors. *See Schimel*, 806 F.3d at 917 (recognizing "difficult[y]" in finding doctors with admitting privileges "not only because it's difficult for abortion doctors to obtain admitting privileges (especially within a prescribed radius of the clinic) but also because of the vilification, threats, and sometimes

Taken either individually or in tandem, H.B.2's ASC and admitting privileges requirements have proved to be insurmountable obstacles to the continued operation of most of Texas's abortion care providers, and it was undisputed below that H.B.2 will effectively close approximately 75% of the state's providers if the Fifth Circuit's decision is upheld.

H.B.2 is part of a broader, coordinated effort to limit abortion access by making it difficult or outright impossible to obtain abortion care. Through H.B.2 and similar statutes in other states, opponents to a woman's constitutional right to choose abortion care have elected to "proceed indirectly, seeking to discourage abortions by making it more difficult for women to obtain them" by enacting measures that "do little or nothing for health, but rather strew impediments to abortion." *Schimel*, 806 F.3d at 921. These efforts cannot be squared with this Court's holding in *Casey*, and Texas's argument that they somehow further a legitimate or valid state interest ignores both their purpose and effect.

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violence directed against abortion clinics and their personnel in states in which there is intense opposition to abortion"); *see also* ROA 2471 ("Physicians have cited several reasons for declining recruitment offers from Whole Woman's Health" including "worrie[s] about their personal safety and the safety of their families," "[h]arassment and threats of violence," "the hostile regulatory enforcement in Texas and potential exposure to criminal liability" and "retaliation by hospital administrators who are opposed to abortion.").

II. TEXAS'S REMAINING PROVIDERS CANNOT REPLACE THE SERVICES THAT WERE LOST AS A RESULT OF H.B.2

Before the District Court, Texas stipulated to the fact that only six existing clinics would *not* be closed by H.B.2's facilities requirements. ROA 2289-90. On appeal, the State later attempted to backtrack, speculating that other providers may perhaps open, or that existing providers might increase their capacity to meet the needs of Texas women. However, no speculation or guesswork is required to identify H.B.2's real impact on NAF's members, as most of those providers have already closed due to the law.

The notion that the handful of remaining providers could meet the demand of all Texas women—requiring ten providers to accommodate a level of patient demand that previously kept more than 40 providers busy—is absurd on its face. *See Lakey*, 46 F Supp. 3d at 682; *see also Schimel*, 806 F.3d at 920 (observing that "one wouldn't think it necessary to parade evidence that the remaining clinics would find it extremely difficult to quadruple their capacity"). To care for this many patients, the remaining providers would need to increase their caseload four-fold. *See Lakey*, 46 F. Supp. 3d at 682 ("[T]he cumulative results of House Bill 2 are that, at most, eight providers would have to handle the abortion demand of the entire state. . . . That the State suggests that these seven or eight providers could meet the demand of the entire state stretches credulity"); ROA 2353 (Direct testimony of Daniel Grossman, M.D.: "My opinion is that these existing

ASCs as a group will not be able to go from providing approximately 14,000 abortions annually, as they currently are, to providing the 60,000 to 70,000 abortions that are done each year in Texas once all of the non-ASC clinics are forced to close"); *Change in Abortion Services* at 496-501 (explaining that the six ASCs which existed at the beginning of 2014 provided just 22 percent of the abortion procedures in the state in 2012). Existing Texas abortion care providers were already operating at full or near capacity prior to H.B.2; it is clear that a much-reduced number of providers would be incapable of meeting this need. *See Change in Abortion Services* at 499 (concluding that "despite the increase in abortions performed in some cities with ASCs, less than a quarter of all abortions in the state are currently performed at ASCs, and it seems highly unlikely that existing facilities could expand their capacity fourfold to meet the demand for services.").

For example, the Routh Street clinic reported that it provided an average of 68 abortion procedures per week in 2013; in 2015, after other providers started to close, it provided an average of 96 abortion procedures per week. This increased patient load was not sustainable, particularly given that one of the clinic's two physicians was no longer able to provide abortion care because of H.B.2's admitting privileges requirement. At times, Routh Street's 67-person waiting area was so full that many patients were required to sit on the floor or wait outside. Its efforts to handle the increase in patients necessitated a tremendous amount of overtime for its staff. The clinic expanded the hours and days it provided care, but even then Routh Street could not fully

accommodate all of the patients left stranded by the closure of other providers. This increased workload took its toll on Routh Street's physician and staff. Despite its ability to provide quality abortion care to Texas women for more than three decades, this pace proved unsustainable and, less than nine months later, the clinic closed in June 2015. Following Routh Street's closure, patients seeking care in the Dallas/Fort Worth area must now find somewhere else to go. The difficulties this imposes are demonstrated by the increase in waiting time from five days or less to as much as 20 days in the Dallas/Fort Worth area. *See Wait Times in Texas.*[7]

Compounding the critical shortage of Texas providers is the reality that all remaining non-ASC facilities will also be forced to close if the Fifth Circuit's mandate goes into effect. For example, in Houston—the fourth most populous city in the U.S. with 6.3 million inhabitants spread over approximately 650 square miles—non-ASC providers currently are seeing a high volume of patients. In an effort to meet the large need for abortion care in Houston, particularly after surrounding facilities have closed, since January 2013 NAF member Houston Women's Clinic ("Houston Women's") has doubled its full-time staff and more than doubled the hours per week that it provides abortion procedures. Likewise, the number of abortion procedures Houston

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[7] From November 2013 to April 2014, the mean wait time at the Dallas facilities had been stable at 5 days or less until Routh Street closed in June 2015, leaving only two open facilities in Dallas. Subsequently, wait times increased to as much as 20 days. *See Wait Times in Texas.*

Women's provided in the first ten months of 2015 represents an *84% increase* from the first ten months of 2012. If the Fifth Circuit's mandate takes effect, Houston Women's would likely close, and only two ASC abortion providers—down from nine facilities prior to H.B.2—will be left to serve the entire Houston region.

The Fifth Circuit's impact on Whole Woman's Health of McAllen similarly highlights the current provider shortage. Under the Fifth Circuit's ruling, the McAllen clinic remains open with only one post-retirement age, part-time doctor, rather than the four well-qualified full-time doctors who were unable to secure local admitting privileges. *See Whole Woman's Health v. Cole*, 790 F.3d 563, 596 (5th Cir. 2015). With less than a quarter of its physicians remaining, McAllen cannot serve more patients now than it did before H.B.2, just as the few providers that remain in Texas cannot compensate for the providers that have closed as a result of H.B.2.

Likewise, if the Fifth Circuit's mandate goes into effect, the remaining ASC providers—which are already stretched to capacity—will be unable to meet the need for abortion care in Texas. Recent research confirms that wait times at ASCs in some cities have already increased significantly since portions of H.B.2 went into effect, underscoring that these ASCs are not even meeting the existing demand, even with help from the several non-ASCs still providing care. *See Wait Times in Texas.*

The experience of NAF member Southwestern Women's Surgery Center ("Southwestern Dallas") in

Dallas also indicates that ASCs are operating at capacity and will be unable to handle the large influx of patients expected if the Fifth Circuit's mandate goes into effect. That provider is now seeing many more patients than it did before H.B.2, and providing approximately 180 procedures per week, as compared with 115 per week before the statute was enacted. Southwestern Dallas has doubled its administrative staff since April 2014 and expanded its procedure days and hours, from 40 procedure hours per week to a current minimum of 60 procedure hours per week. Despite those efforts, it still cannot keep up with the current patient demand, and it may not be able to expand further to accommodate additional patient demand if other providers were to close as a result of H.B.2. Even after expansion, Southwestern Dallas must still turn away many women due to its inability to handle additional patients. Southwestern Dallas has also indicated that it may have difficulty sustaining its increased capacity given the high degree of burn-out experienced by staff due to long hours, and that the legal and political uncertainty of continued operation has affected its ability to retain personnel.

III. H.B.2 IMPOSES AN UNDUE BURDEN ON TEXAS WOMEN

H.B.2's substantial restrictions already have unduly burdened Texas women, increasing the distance that most women must travel to reach an abortion provider, reducing the number of available appointments, delaying abortion care, and making abortion care more expensive and sometimes more complicated. H.B.2's medically unnecessary

requirements are not trivial inconveniences that can be easily overcome, particularly for women who are low-income or live in rural communities. Rather, they are substantial obstacles and many women have effectively lost the option of safe, affordable, and timely abortion care. Taken together, H.B.2's barriers to access impose just the sort of undue burden on Texas women's access to abortion care that this Court held unconstitutional in *Casey*. *See Casey*, 505 U.S. 845. Nor are these barriers justified by any offsetting medical benefit to women.

First, it is undisputed that many Texas women will need to travel tremendous distances to seek out an abortion provider if H.B.2's challenged provisions are not set aside. Remaining clinics will be located in only a handful of cities, requiring even more women to travel hundreds of miles, in repeat trips, to seek care from a Texas provider. *See* Kim Soffen, *How Texas Could Set National Template for Limiting Abortion Access*, N.Y. Times (Aug. 19, 2015), http://www.nytimes.com/2015/08/20/upshot/how-texas-could-set-national-template-for-limiting-abortion-access.html?_r=0 (noting that "[a] fifth of Texas counties, primarily in the western half of the state, are more than 100 miles farther from a clinic today than they were in 2012."); Texas Policy Evaluation Project, *Access to Abortion Care in the Wake of HB2* (July 1, 2014), http://www.utexas.edu/cola/txpep/_files/pdf/AbortionAccessafterHB2.pdf (last visited Jan. 3, 2016) (discussing impact of H.B.2, including clinic closures, increased travel distances, "higher costs and logistical challenges, which in some cases result in delays accessing care," and remaining clinics' likely inability

to meet demand).

Traveling great distances imposes significant hardships for many women, including the cost of gasoline or bus fare; lost compensation or risking loss of employment entirely by taking time off from work; and the costs of childcare and staying overnight in a distant city.[8]

Especially considering the significant impact that these restrictions already have had on low-income Texas women, this travel-related burden is not trivial. According to U.S. Census Bureau data, the poverty rate for women living in Texas's border region—where only the McAllen clinic will remain open, subject to the Fifth Circuit's onerous restrictions—is twice that of the non-border region, with 88% of Texas-Mexico border counties having a median income below the state level. As Texas's own

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[8] These vastly increased distances highlight the absence of health benefits associated with H.B.2's admitting privileges requirement. As H.B.2 closes clinics and women are forced to travel much greater distances, women who may experience rare complications outside of the clinic "may live near a hospital, but not a hospital at which the doctor who performed her abortion has admitting privileges." *Schimel*, 806 F.3d at 915 ("If she calls an ambulance the paramedics are likely to take her to the nearest hospital—a hospital at which her abortion doctor is unlikely to have admitting privileges."). Even given the relatively small number of women who experience such a rare complication, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction," and, particularly for those women, H.B.2 undoubtedly imposes an undue burden with no corresponding health benefit whatsoever. *See Casey*, 505 U.S. at 894.

Health and Human Services Commission has recognized, the border counties comprise a "less healthy population with less means to pay for health care." TEXAS HEALTH AND HUMAN SERVICES COMMISSION, FACTORS INFLUENCING HEALTH CARE ON THE TEXAS-MEXICO BORDER 7 (2014), *available at* http://www.hhsc.state.tx.us/reports/2015/Factors-Influencing-Health-Care.pdf (last visited Jan. 3, 2016). Many Texas women simply cannot afford hundreds of dollars for a trip to an abortion provider. *See* ROA 2471 (testimony confirming that despite financial assistance in the form of gas cards and bus tickets, for the "vast majority" of women, "other obstacles prevented them from making the trip to San Antonio . . . includ[ing] the inability to take the required length of time off from work and the inability to secure childcare for that length of time.").

NAF's members are all too familiar with the burdens that increased travel distances have had on Texas women, and frequently hear from women who must travel over 100 miles for abortion care. Since the passage of H.B.2, the NAF Hotline has been flooded with calls from Texas women desperately seeking timely abortion care. Some women have had to rely on public transportation or friends and family to travel to their appointments, which is often a hardship, particularly for those who need to travel longer distances to receive care as a result of H.B.2. This consequence of H.B.2 alone has severely restricted these women's ability to exercise their right. Moreover, other women have had to pawn or sell personal items, such as furniture or wedding rings, to pay for the additional costs.

NAF Hotline data reflects that Texas women have been required to travel increasingly long distances, including over state lines, to receive abortion care. For example, the number of Texas women that the NAF Hotline has assisted in receiving abortion care in New Mexico has increased dramatically, from 21 patients in 2013 to 209 patients in the first 11 months of 2015. Likewise, NAF member Hope Medical Group for Women ("Hope Medical") in Shreveport, Louisiana, has seen a marked increase in Texas patients, from 15.56% in 2011 to 22.77% in 2014.[9] Data from NAF member Southwestern Women's Options in Albuquerque, New Mexico, ("Southwestern Albuquerque") similarly confirms that the number of pre-20 week patients traveling from Texas more than tripled, from 19 patients in the first quarter of 2012 to 67 patients in the first quarter of 2015. This includes patients not just from the New Mexico/Texas border area or even western Texas; Southwestern Albuquerque is almost *four hours away by car* from the Texas border, and yet has been inundated with women coming from major Texas cities such as San Antonio, Dallas, and Houston who have tried and failed to obtain timely appointments in Texas.

Yet, out-of-state providers still have not been

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[9] Currently a District Court injunction blocks a Louisiana law requiring abortion providers like Hope Medical to have admitting privileges. If H.B.2 is upheld, the Louisiana law would also be declared constitutional and Hope Medical would close. *See* Temporary Restraining Order, *June Medical Services, LLC d/b/a/ Hope Medical Group for Women v. Caldwell*, No. 3:14-cv-00525-JWD-RLB (M.D. La. Aug. 31, 2014) (Dkt. No. 31).

able to accommodate all of the women who H.B.2 has left without abortion care options. Nor should they be required to do so. *See Jackson Women's Health*, 760 F.3d at 458 (Plaintiff "demonstrated a substantial likelihood of proving that . . . effectively closing the one abortion clinic in [Mississippi] has the effect of placing a substantial obstacle in the path of a woman seeking an abortion in Mississippi"); *see also Schimel*, 806 F.3d at 918 ("[T]he proposition that the harm to a constitutional right [can be] measured by the extent to which it can be exercised in another jurisdiction . . . [is] a profoundly mistaken assumption") (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011)).

NAF frequently hears stories from women who have difficulty accessing abortion care. Patient stories from Valerie Peterson, "Cara,"[10] "Alice," "Rhonda," and "Janet" underscore the extreme hardships that Texas women have faced following the passage of H.B.2.

Dr. Valerie Peterson, a single mother in her thirties living in Austin, found out that she was pregnant in July 2015. Her pregnancy was a surprise, as she had been told she could not have more children. She had been a teenage mother to her first daughter, and had her second baby while she was still in college. She worked full-time while attending school as a single mother of two, all the way through earning a Ph.D. Although her most recent pregnancy was unexpected, it was very much wanted, and she

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10 Patient names placed in quotation marks have been changed to protect their privacy.

planned to carry it to term. Because she was a high-risk pregnancy due to high blood pressure, she began going in for ultrasounds every two weeks. At her twelve week scan, she was told that there was an abnormality in her unborn son's brain, but that more testing was needed. She went back and forth to her doctors for additional tests throughout the next several weeks, until her 16 week appointment confirmed a diagnosis of alobar holoprosencephaly, a condition incompatible with life.

Dr. Peterson was told that she could either continue the pregnancy and eventually miscarry or give birth to a stillborn baby, or she could terminate the pregnancy. She was emotionally devastated by the diagnosis but knew she needed to end the pregnancy. Her doctor referred her to an Austin abortion provider, but when she attempted to schedule her procedure she discovered she would need to wait three weeks for the first available appointment. Though Dr. Peterson's maternal health specialist was eventually able to find an earlier appointment, she was again devastated to learn that her procedure would still be a four-day process due to Texas's laws, including a mandatory waiting period. Dr. Peterson was in severe emotional pain and simply could not countenance the delay in obtaining care. Luckily, with a friend's help, she was able to find a provider that could see her earlier in Florida. She was fortunate that she had the connections to find an available provider and that she had sufficient financial resources to travel to Florida despite her insurance refusing to cover her procedure. Most Texas women do not have such resources and are left without hope or options.

"Cara," who lives in Killeen with her three children, recently relayed her H.B.2-related difficulties in obtaining abortion care to the NAF Hotline. Cara had just lost her job and was struggling to make ends meet when she found out sbe was pregnant. Cara decided that abortion care was the right decision for her and her family, but even after asking friends and family for help she was not able to save enough money for her procedure without the help of abortion funds. The nearest abortion care provider was nearly 130 miles away, which meant she also had to find the funds to pay for gas, and ultimately was required to rely on a last-minute loan. Cara was unable to find someone to drive her to and from her procedure—a six hour round-trip drive—and had to go alone.

"Alice" is a mother of two, living just south of Beaumont, struggling to make ends meet. Alice is currently in the process of divorcing her husband, who raped her and left her with a pregnancy she did not want. She knew abortion care was the right decision for herself and her family and planned to ask her family for financial help. Unfortunately, her family did not believe that Alice was raped and refused to help her. Even with three jobs, Alice was behind on her bills. She was not receiving any financial help from her husband to help care for their children because he had been incarcerated. In addition to trying to save money for her procedure, Alice also had to find a way to get to the nearest provider—twice—which was located 85 miles away, take time off from work to make those trips, and find childcare. Fortunately, even though she could not help with financial support, Alice's best friend was able to drive

the 340 miles over the course of two days, and her best friend's parents were able to look after Alice's children.

"Rhonda" is a mother of three living in Cypress. She is struggling to make ends meet, having lost her job right around the time that she found out that she was pregnant. Rhonda and her partner decided that obtaining abortion care was the right decision for their family and began asking her family to help to pay for the two trips to the nearest provider, which was located an hour away. Rhonda was worried, though, because the earliest the abortion facility could schedule her was almost four weeks away. While this gave her extra time to save up money for her procedure, it meant having to wait almost a full month before she could get the care she needed, and also put her close to the limit where the cost for the procedure would dramatically increase.

"Janet" is a full-time graduate student and single mother of a young son living in Dallas. When Janet discovered she was pregnant, she decided that abortion care was the right decision for her and, on November 30, 2015, she called a Dallas clinic to schedule an appointment. The clinic told her that the first available appointment was not until January 5, 2016, more than five weeks later. Knowing that delaying her procedure that long would result in a much more expensive procedure, notwithstanding the emotional and physical strain of waiting over a month to receive care, Janet tried calling every clinic in the area but could not get an earlier appointment. She expanded her search for an abortion provider to Houston, almost 300 miles from her home, where she

was able to schedule an appointment for later that week at a NAF member clinic, which will itself be forced to close if H.B.2's ASC requirement goes into effect. Janet had to miss three days of her graduate program without advance notice, find childcare for her son, and use her savings to pay for multiple nights in a hotel and more than 500 miles of round trip travel. Scared that she would not be able to get another appointment until 2016, Janet had no choice but to endure the financial and emotional strain of long-distance travel to secure timely abortion care. On December 3, 2015, she received the abortion care she needed, and was able to make the four-hour return drive to her home in Dallas, where the next available appointment was still more than a month away.

The harsh impact of this law is made plain by these stories, bravely told by Dr. Valerie Peterson, "Cara," "Alice," "Rhonda," and "Janet" with the hope that this Court can improve conditions for women in Texas who are seeking to exercise their right to choose abortion care. Indeed, for many Texas women, the obstacles that these women navigated would have proved insurmountable. These women would not have faced these obstacles but for H.B.2. Notably, both Killeen and Beaumont had NAF member facilities that were closed by H.B.2. *See* Angel San Juan, *Beaumont's Only Abortion Clinic Is Closing*, 12NewsNow (Beaumont, TX) (Mar. 16, 2014), http://www.12newsnow.com/story/24899929/beaumonts-abortion-clinic-is-closing (attributing closure of clinic to H.B.2's requirements); *Fewer Abortion Clinics in Texas*, N.Y. Times (June 10, 2015), http://www.nytimes.com/interactive/2014/08/

04/us/shrinking-number-of-abortion-clinics-in-texas.html?_r=0 (listing clinics closed as a result of H.B.2). Likewise, all of these stories highlight the cruel emotional, financial, and psychological harms that the Texas legislature has visited on women who struggle to obtain timely care because a majority of Texas's abortion care providers have closed due to H.B.2. If H.B.2 goes fully into effect and more providers are forced to close, these harms will only multiply.

Indeed, courts throughout the country already have recognized the undue burdens that long-distance travel places on low-income women. *See Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 916 (9th Cir. 2014) (observing that increased costs "to the patient for transportation, gas, lodging and the time she must take off from work" are "significant and sometimes prohibitive" for women living in poverty), *cert. denied*, 135 S. Ct. 870 (2014); *Van Hollen*, 738 F.3d at 796 ("Some patients will be unable to afford the longer trips they'll have to make to obtain an abortion when the clinics near them shut down."). As one court has noted: "For [women living in poverty], going to another city to procure an abortion is particularly expensive and difficult" as these women "are less likely to own their own cars," are "dependent on public transportation, asking friends and relatives for rides, or borrowing cars," are "unlikely to have regular sources of child care," and "are more likely to work . . . with an inflexible schedule and without any paid time off." *Strange*, 33 F. Supp. 3d at 1357.

These burdens are further magnified in light of

the fact that many women must make more than one trip to a clinic. In Texas, there is a 24-hour mandatory waiting period between a required ultrasound and an abortion procedure. Tex. Health & Safety Code Ann. §171.012 (West 2014). Therefore, many women must spend one or more extra nights in a hotel or pay for several rounds of travel, unless they have to travel more than 100 miles to an abortion provider and therefore qualify for an exception to the waiting period law. Moreover, for medical, rather than surgical, abortion care, Texas law effectively requires four visits to the provider, encompassing an initial ultrasound, two separate visits for medical abortion care, and a follow-up visit 14 days later. *See* Tex. Health & Safety Code Ann. §§171.012.a.4, 171.063.e (West 2014). H.B.2's restrictions magnify the already substantial travel and lodging costs required for women, unless they happen to live—and are able to obtain an appointment—in one of the few major cities that has an abortion provider. This constitutes a substantial obstacle to exercising the right recognized in *Casey*. *See* 505 U.S. at 877.

Second, H.B.2 imposes unnecessary health risks that are not counterbalanced by any compelling need on the part of the State. As demonstrated above, Texas women already must wait longer for appointments and to receive care, given the high patient volume and limited availability of providers. A recent study shows that some of the ASCs currently providing abortion care may not be able to increase the number of abortion procedures they provide, given their consistently long wait times. *See Wait Times in Texas* (long wait times indicate that ASCs "are unable to meet the demand for services among the patients

they serve"). For example, in the summer of 2015, providers in both Austin and Dallas/Fort Worth experienced wait time increases of as long as 23 days. *See id.* (observing that when one additional clinic in Dallas was forced to close, leaving "only two open facilities in Dallas," "wait times increased to as much as 20 days" from 5 days, and "one facility was unable to schedule patients at all"). Likewise, Hope Medical has informed NAF that some Texas women are waiting for three weeks just to obtain a first visit, and many are forced to travel out-of-state to Louisiana to seek care.

This delay is more than a minor inconvenience, as the costs and risks associated with abortion care increase as a pregnancy progresses. As the District Court correctly recognized, "[h]igher health risks associated with increased delays in seeking early abortion care, risks associated with longer distance automotive travel on traffic-laden highways, and the act's possible connection to observed increases in self-induced abortions almost certainly cancel out any potential health benefit." *Lakey*, 46 F. Supp. 3d at 684. The Seventh Circuit recently pointed to this effect in holding that a similar law placed an undue burden on a woman's right to choose abortion care:

> The feebler the medical grounds (in this case, they are nonexistent), the likelier is the burden on the right to abortion to be disproportionate to the benefits and therefore excessive. . . . [W]hat makes no sense is to abridge the constitutional right to an abortion on the basis of spurious contentions regarding women's

> health—and the abridgment challenged in this case would actually endanger women's health.

Schimel, 806 F.3d at 920; *see also Casey*, 505 U.S. at 878 ("Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.").

Research suggests that women choosing abortion care are already being pushed later into their pregnancies: in the six months after H.B.2's admitting privileges requirement was implemented, 13.9% of abortion procedures in Texas were provided at 12 weeks of pregnancy or later, compared to 13.5% in the same 6-month period one year prior (and up from 10.7% in 2012, according to Texas Department of Health Services statistics). *See Change in Abortion Services* at 499.

If the Fifth Circuit's mandate is permitted to take effect, and the remaining non-ASC providers are forced to close, research confirms that wait times will further increase dramatically at several remaining ASCs. As wait times grow, the proportion of second-trimester abortion care will increase. If wait times were to increase to 20 days—which researchers indicate is currently happening in Dallas/Fort Worth—the number of second trimester abortion procedures would nearly double. *See Wait Times in Texas* (finding that wait times that consistently average 10 days in Austin, Dallas/Fort Worth and Houston would increase the proportion of statewide abortion procedures provided in the second trimester

from 10.5% to 13.5%, and that average wait times of 20 days would increase the proportion to 19.5%, "translat[ing] to about 5,700 more abortion procedures delayed to the second trimester due to increased wait times").

NAF member Southwestern Dallas reinforced this projection, observing that it has seen more patients coming later in the first trimester, which changes both their procedure options and the amount of time they must stay at the facility. Likewise, Southwestern Albuquerque is seeing additional low-income Texas women later in their second trimester due to reduced access to both first and second trimester abortion care in Texas.

Delays increase cost because later abortion procedures are lengthier and sometimes require additional personnel. *See* Ushma D. Upadhyay *et al.*, *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, Am. J. Pub. Health (Sept. 2014) ("Because later abortions are more complex procedures, often occurring over 2 or more days, they are also more costly . . . [T]he average charge for an abortion at 10 weeks is $543 compared with $1562 for an abortion at 20 weeks."). Thus, the damage is two-fold: in addition to making abortion care harder to obtain and pushing women into later procedures—some into their second trimester—H.B.2 effectively prices many women out of receiving abortion care that they have a constitutional right to access.

Third, H.B.2 could have direct health consequences for women who choose less safe

alternatives if safe, legal abortion care is unavailable to them due to H.B.2's financial and logistical obstacles. Experience shows that the lack of legal options will not stop women choosing abortion care from seeking to terminate their pregnancies. Some women will instead resort to self-medicating without the proper knowledge to safely induce abortion. Some Texas women are already trying to induce abortion on their own, using methods that are *rumored* to terminate pregnancy, regardless of their actual medical safety or efficacy. *See Rise of the DIY Abortion* ("'[Women] are going to figure out ways to have an abortion . . . I even have patients that call, and after we tell them that we can't offer abortions anymore, they'll just say, 'That's fine. I'm going to figure out a way to do this on my own.'"); Daniel Grossman *et al.*, *The Public Health Threat of Anti-Abortion Legislation*, 89(2) Contraception 73, 73 (2014) ("7% of women reported taking something on their own in order to try to end their current pregnancy before coming to the abortion clinic."); ROA 2471-72 (detailing that, following the closure of clinics in the Rio Grande Valley, clinics received reports about women attempting to self-induce abortions and healthcare providers rendering treatment when such attempts were unsuccessful or resulted in complications) (citing Trial Exs. P-020, P-022).

NAF members have first-hand experience with patients who have attempted to self-induce abortion. For example, one doctor at a Texas provider treated a patient and found parsley in her vagina from a misguided attempt to self-induce abortion. Other providers have found that women have "tried

something" prior to coming to a clinic for assistance. Further, women who experience complications from improper use of medications or other remedies may delay or forgo medical treatment for fear of prosecution. *See* Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 Guttmacher Policy Review 70 (2015), *available at* http://www.guttmacher.org/pubs/gpr/18/3/gpr1807015.html (last visited Jan. 3, 2016).

The facts demonstrate that timely, safe, and legal abortion care to which Texas women have a constitutional right is becoming simply unavailable because of the undue burdens imposed by H.B.2. This Court has acknowledged that abortion care is one of "the most intimate and personal choices a person may make in a lifetime[,] . . . central to personal dignity and autonomy," and a key factor allowing "women to participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 851, 856. H.B.2 cruelly denies Texas women their dignity, eliminates the vast majority of Texas abortion providers, and exposes women to unnecessary health risks without any corresponding benefits.

CONCLUSION

For all of the reasons stated above, H.B.2 imposes a substantial obstacle to abortion access and unduly burdens the rights protected by the due process clause of the Fourteenth Amendment. *See Casey*, 505 U.S. at 846. This Court should reverse the Fifth Circuit's decision.

Respectfully submitted,

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